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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| MARIANNA PANOSSIAN,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>PASADENA CITY COLLEGE and VELMA DOUGLAS,<br><br>Defendants and Respondents. | B245749<br><br>(Los Angeles County Super. Ct. No. BC438491) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Kevin Brazile, Judge. Affirmed.

Shegerian & Associates, Carney R. Shegerian and Anthony Nguyen for Plaintiff and Appellant.

Walsh & Associates and Dennis J. Walsh for Defendants and Respondents.

* * * * * *

Marianna Panossian (appellant) appeals from a summary judgment entered in favor of employer, Pasadena Area Community College District (the district) and Velma Douglas (Douglas and the district are hereinafter collectively referred to as respondents), on a complaint for violations of the California Fair Employment and Housing Act (FEHA) (Gov. Code,[1] § 12900 et seq.) and the California Family Rights Act (CFRA) (§ 12945.2). We affirm.

## FACTS AND PROCEDURAL BACKGROUND

The following facts are taken from the evidence before the trial court when it ruled on the summary judgment motion. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034-1035.) The parties agree that appellant began working for the college in 2000 as an Admissions and Records Clerk II in the Admissions and Records Department. Carol Kaser was appellant's direct supervisor at the time appellant was hired.

### Ramey's Supervision from 2003 until 2005

In 2003, Margaret Ramey, the Dean of Admissions and Records, who is Caucasian, became Kaser's supervisor. The Admissions and Records Office is a demanding environment. Because student's questions are time sensitive, it was imperative that inquiries be responded to in a timely manner. Ramey declared that she observed that appellant's work was deficient. Ramey received complaints from co-workers, faculty and students about appellant's work performance. Appellant was criticized for socializing too much in the office because it distracted her co-workers. Appellant's performance evaluations reflected that she needed to be more diligent in returning telephone calls and e-mails in a timely manner. Appellant needed to curtail socialization. Ramey talked to appellant about being away from appellant's desk and regarding complaints from students.

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[1] All further statutory references are to the Government Code unless otherwise indicated.

Ramey's performance evaluations of appellant also reflected that appellant had issues with tardiness and absences. The issues were related to appellant's mother's medical condition. Apparently, appellant's tardiness and inaccessibility caused resentment from her co-workers.

Appellant denied that Ramey got any complaints from students and maintained Ramey was fabricating the complaints. Appellant provided evidence that her immediate supervisor, Kaser, believed appellant did an excellent job. Appellant and Kaser declared that, in 2005, Kaser and Ramey authorized appellant to come in late and leave during the day to care for her mother. Even though appellant was tardy, she finished her work early because she was an exemplary employee. Appellant claimed that Ramey did not like her because of her Russian and Armenian nationality.

According to Kaser, Ramey pitted employees against each other and used that as an excuse to write negative and false comments in appellant's performance reviews. Some issues arose between, appellant, who is of Russian and Armenian descent, and a co-worker, Dee Adams, an African-American woman. Ramey allegedly noted in both employees' files that they had a personality conflict. Ramey denied making the notation. Appellant produced conflicting evidence that Ramey instructed appellant's direct supervisor to make the notation. Appellant declared that she had no problems with Adams and it was Adams who had problems with her. It was disputed whether Ramey knew that Adams referred to appellant as a "white princess."

Appellant had flags from different countries on her desk. The parties disputed whether Ramey asked her to remove the Russian and Armenian flags from the desk. The parties disputed whether Ramey asked appellant to remove photographs from appellant's desk.

In 2003 or 2004, appellant decorated her workstation during Christmas. Ramey asked her to remove the decorations after January 2. Appellant declared that she told Ramey that Armenian Christmas was not celebrated until January 6. Ramey replied, "Well, I don't care! This is America, and here we celebrate it on December 25th. Take it down!" Ramey denied knowing about Armenian Christmas when she told appellant to

take down the decorations. Ramey asked another employee to remove Halloween decorations at his desk after the day had passed, because she thought it looked unprofessional to allow decorations to remain after a holiday had passed.

Ramey denied that her performance evaluations were based on anything other than her own observations and complaints she received about appellant's performance. She denied that the evaluations were based on appellant's race or national origin.

Appellant made oral and written complaints to Human Resources and various supervisors, including Kaser, Jeannie Nishime, and Lisa Sugimoto, about Ramey's treatment of appellant. Appellant made 12 complaints to Sugimoto, who was the vice-president of Student Services. There was also a three-step grievance procedure to allow employees to make a formal complaint. Appellant did not engage in this process. She admitted not engaging in the process but claimed it was because nothing was done when she complained. However, appellant did tell Kaser she thought Ramey targeted her because of her national origin and/or her race.

**Amy Yan's Supervision of Appellant from 2005 until 2006**

In 2005, appellant was involuntarily transferred to Building D after a new department, the International Student Office, was created. Respondents claimed the transfer was because appellant was the only person performing admission duties on behalf of international students and therefore she had to physically transfer to the International Student Office. Appellant disputed this evidence and claimed that Ramey actually forced her out of her job. In 2004, appellant was informed of the planned move. After she was notified that she was moving appellant claimed she was not given sufficient notice of the move.

After appellant was transferred, her job title remained the same. However, her schedule was changed to an earlier start time and as a result appellant lost differential pay which she had received for working after 5:00 p.m.

Ramey and appellant had very little interaction after the 2005 move. However, appellant claimed that Ramey influenced appellant's new supervisor, Amy Yan, to mistreat her. This was because Yan's supervisor, Nishime, was a friend of Ramey's.

Appellant was the only admissions person in the International Student Office. Part of her duties included processing student applications and accepting and depositing any application fees paid by students. She was required to deposit the checks within a reasonable time of receipt. Appellant was accused of leaving several checks in her desk for several months without depositing them. While appellant was on a long leave, Yan obtained authorization from her supervisor to open appellant's desk to get the checks.

On October 15, 2005, appellant attended an unscheduled performance evaluation meeting with her attorney, Vic Collins (the Dean of Human Resources), Yan and Nishime. The performance evaluation reflected a number of deficiencies in appellant's performance. Appellant was away from her desk for long periods of time without informing Yan. She frequently escorted students to other buildings leaving her desk. Appellant spent a lot of time away from her desk. She was told that her supervisors received complaints that she did not return phone calls and e-mails from students. Appellant was also informed that students had to wait for her if she was away from her desk, and it was not her responsibility to take students to other offices.

Appellant responded to the performance evaluation by sending letters to human resources, her union, the Board of Trustees, and the District's president and vice-president. Appellant denied the truth of the criticisms in the performance evaluation prepared by Yan. Rather, she claimed that her work performance was exemplary. Appellant also prepared a grievance because the performance evaluation was unscheduled. Her grievance was denied. Appellant was instructed to report her departure times, destination, purpose of absence, and return times to Yan.

Appellant also complained to her employer and union when Yan signed appellant's name to an absence form. Yan signed the form and then initialed it because she and appellant disagreed about the amount of time appellant had taken off work.

In January 2006, Yan's performance evaluation of appellant reflected that appellant went over her allotted break times. Collins issued a memo to appellant concerning her late arrivals from breaks. Appellant denied exceeding the break times. Although Yan did not make any derogatory remarks about appellant's race of national

origin, appellant claimed that Yan's criticisms about her stemmed from Ramey's discriminatory conduct.

In February 2006, appellant requested an inter-department transfer to Health Sciences. After the transfer, appellant and Yan had no further interaction. However, after appellant left, Yan accused appellant of deleting from her computer the files containing the forms she had been using, which resulted in a *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*) hearing. The matter was ultimately dropped. Appellant claimed that this *Skelly* hearing was the result of Ramey's influence over Nishime and Yan.

**Douglas's Supervision of Appellant from 2008 until 2009**

When appellant moved to Health Sciences in 2006, she was an Interoffice Clerk II. Susan Clifford was her supervisor. In March 2008, Velma Douglas, the Nursing Program Director, and Lori Gagliardi, the Allied Science Program Director, became appellant's supervisors. In 2008, appellant took leave under the Family and Medical Leave Act (29 U.S.C. § 2601 et seq.).

Douglas observed and received complaints about appellant's deficient work performance. The deficiencies included frequent tardiness, failure to process applications, and being frequently away from her desk. Appellant was also difficult to contact, failed to complete tasks and spent excessive amounts of time speaking with students. Appellant was told of her work deficiencies and was placed on a Plan of Improvement in 2009.

Appellant denied that the claimed work deficiencies were true. Rather, she was an exemplary worker, which was illustrated by glowing reviews from her former supervisor, Kaser. Appellant claimed that Douglas fabricated the deficiencies because Douglas did not like Armenians. Douglas said she did not like Armenians, and that all Armenian and Russian students were cheaters. Douglas expelled Armenian students from the program without investigation. Douglas also required appellant to speak English in the office and would not allow her to speak in Armenian to students. Appellant complained about Douglas to Clifford, Jackie Jacobs, the vice-president of instruction and human resources.

When appellant married in 2007 and changed her name to Panossian, Gagliardi asked her, "Why couldn't you have gotten a better name, like Smith or Jones?" Appellant thought that Allissa Elliott, another clerk in Health Sciences, also discriminated against appellant on the basis of race. Elliott made derogatory remarks to her on at least three occasions. Elliott apparently said, "There's too many damn Armenians coming into this department." Appellant complained about Elliott to Jacobs.

When appellant told her supervisors she was pregnant, they placed pressure on her to complete everything in case she went into labor early or had to take another medical leave. During a meeting, Douglas made a derogatory comment about appellant's memory loss being a side effect of pregnancy. Appellant was on maternity leave from July 6, 2009 to August 23, 2009.

Appellant's supervisors also decided to give appellant a second Plan of Improvement. However, because appellant went on maternity leave early, the plan was not discussed with her. Douglas and Gagliardi also decided to modify appellant's duties. The modification was that Elliott would process all applications for Health Sciences. Appellant would focus on student concerns and issues because that was her strength. The modifications were not discussed with appellant because of her maternity leave. The modification was not a demotion.

When appellant returned from maternity leave on August 24, 2009, she was given a letter informing her of the modifications. The office had been reorganized and appellant's personal belongings had been removed. According to respondents, appellant's personal items were removed for safekeeping because her workstation was used by four other people while she was on leave. Appellant believed that the modification and move were made to push her out of her position. On the day she returned to work, she was so stressed out that she had an anxiety attack and was taken by ambulance to the hospital after she hyperventilated and fainted.

Appellant was on extended sick leave from August 25 to November 25, 2009. She did not return to work by November 25, 2009, when all her sick leave was exhausted. Appellant was entitled to sick leave of 96 hours and extended leave of 88 days for the

fiscal year, which was exhausted by July 21, 2009. The District's policy is to place an employee on a 39-month re-employment list after all sick leave and extended sick leave was exhausted and the employee has not been cleared to return to work. Appellant was placed on a 39-month re-employment list on November 26, 2009.

It was undisputed that appellant never asked for any family leave after returning from maternity leave and before she was placed on the list. Appellant did not dispute that she had not been cleared to return to work as of December 5, 2009. She did not ask for additional leave after receiving a December 2, 2009 letter informing her that she had been placed on the 39-month re-employment list. However, the parties disputed when appellant was cleared to return to work and whether she advised respondents that she was cleared to return to work as of January 2, 2010. Appellant's personnel records do not reflect that a note was received clearing appellant for work.

Appellant declared that she informed her supervisors and human resources that she was cleared to work in January 2010. Appellant denied that she had exhausted all of her sick leave by July 2009. She also stated that no employee other than she had been placed on the 39-month re-employment list. Other employees were offered unpaid extended sick leave.

Appellant also claimed that respondents were aware that she had a "disability" because they called the paramedics for her in August 2009 when she fainted. She claimed that she requested a reasonable accommodation for her disability by informing them that she was being released to return to work as of January 2010.

Appellant filed a claim with the Department of Fair Employment and Housing (DFEH) on February 18, 2010. The claim alleges termination, harassment, retaliation, discrimination, and failure to prevent retaliation on the basis of sex, race/color, national origin/ancestry and pregnancy.

**The Third Amended Complaint**

The third amended complaint, which is the operative pleading, contained causes of action for: disability discrimination (first); disability harassment (second); retaliation for complaining of discrimination and harassment on the basis of disability (third); race,

nationality and ancestry discrimination (fourth); harassment for race, nationality and ancestry (fifth); retaliation for complaining of race, nationality and ancestry discrimination (sixth); discrimination for taking CFRA leave (seventh); harassment for taking CFRA leave (eighth); retaliation for taking CFRA leave (ninth); failure to accommodate disability (tenth); and failure to engage in the interactive process (eleventh). In addition to respondents, appellant also named as defendants, four other individuals who were voluntarily dismissed in October 2011. The first, second, third and eighth causes of action, which were dismissed in March 2012, are not subject to this appeal.

**The Summary Judgment Motion**

After answering the third amended complaint, respondents moved for summary judgment. Respondents argued summary judgment was appropriate as to the fourth cause of action for harassment because the conduct occurred before February 18, 2009 and appellant did not file a complaint with the DFEH until February 18, 2010. On the merits, appellant could not prove: she was performing her job in a satisfactory manner; there was a material adverse employment action; there was a causal connection between her race and any adverse action; and the reason appellant was placed on the 39-month re-employment list was a pretext for discrimination.

Respondents argued that appellant could not establish the fifth cause of action for a hostile work environment because the comments were nothing more than stray remarks made by different supervisors and co-workers over a period of almost a decade. All the conduct occurred prior to 2007.

As for the sixth cause of action for retaliation, respondents contended most of the claims occurred prior to February 18, 2009. Appellant complained to Collins in 2005. Appellant was placed on the list in November 2009. Appellant complained to Jacobs in June 2009 about Douglas's treatment of her but appellant did not complain about alleged racial discrimination. Appellant cannot establish a causal link between her complaints and her placement on the 39-month re-employment list.

Respondents argued that appellant could not establish that she had exhausted administrative remedies regarding the claims for: discrimination for taking CFRA leave (seventh); retaliation for taking CFRA leave (ninth); failure to accommodate disability (tenth); and failure to engage in the interactive process (eleventh). Appellant did not include any of these claims in her February 18, 2010 FEHA complaint.

Appellant could not establish a prima facie case for discrimination for taking CFRA leave because she only called in sick and did not request CFRA leave. She was off work from August 25 through November 25, 2009, a total of 13 and one-half weeks. She was only entitled to 12 weeks under the CFRA. For similar reasons, appellant could not establish a prima facie case for retaliation for taking CFRA leave (ninth). In addition, appellant was placed on the 39-month re-employment list because she had exhausted her available paid leave.

The failure to accommodate claim disability (tenth) failed because appellant was out on sick leave beginning in August 24, 2009. However, she never requested an accommodation and did not inform respondents of any disability. Respondents cannot be held liable for failing to accommodate an unknown disability. Similarly, respondents cannot be liable for failing to engage in the interactive process (eleventh cause of action) because appellant failed to initiate the process or make the employer aware of any disability.

In opposition, appellant argued that she had received "exemplary work performance" reviews from her supervisor, Kaser, until Ramey was hired in 2003 as the Associate Dean of Admissions and Records. Because appellant was Armenian, Ramey did not like her and discriminated against her by making false claims. In 2005, when appellant was "involuntarily" transferred to the International Student Office, the discrimination continued because Yan's supervisor was a friend of Ramey. Appellant declared that Yan falsely claimed that she was not a good worker. Yan discriminated against her on the basis of race and because of a medical leave. In 2006, after appellant asked to be transferred to Health Sciences, her new supervisors Gagliardi and Douglas discriminated against her on the basis of her ancestry.

On October 1, 2012, the trial court summarily adjudicated all causes of action. The trial court concluded claims arising before February 9, 2009 were time-barred. The continuous violation doctrine did not apply. Appellant failed to exhaust administrative remedies as to the seventh, ninth, tenth and eleventh causes of action. Respondents established that they were entitled to judgment on the fourth cause of action for discrimination, because appellant did not produce evidence that the adverse employment action taken against her in November 2009 was a pretext. The evidence was insufficient to support the harassment claim in the fifth cause of action. Appellant could not prevail on the retaliation claim in the sixth cause of action because appellant failed to produce any evidence of a connection between a protected activity and an adverse employment action. The trial court entered summary judgment in favor of defendants on November 20, 2012. This timely appeal followed.

## DISCUSSION

### I. Standard of Review

A defendant is entitled to a summary judgment "only if 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.]" (*Martinez v. Combs* (2010) 49 Cal.4th 35, 68 (*Martinez*).) "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] . . . [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact . . . . A prima facie showing is one that is

sufficient to support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850-851, fns. omitted.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.) We independently review the record to determine whether triable issues of material fact exist. (*Elks Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 606.) We review the evidence in a light most favorable to the losing party resolving ambiguities and evidentiary disputes in the losing party's favor. (*Martinez, supra,* 49 Cal.4th at p. 68.)

For the reasons stated below, we conclude that respondents established defenses as a matter of law to each of the remaining claims in the third amended complaint. As a result, the trial court properly granted summary judgment in respondents' favor.

**II. The FEHA Claim**

An employee is required to file a complaint with the Department of Fair Employment and Housing (DFEH) within one year of the alleged unlawful practice. (§ 12960, subd. (d); *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492 (*Romano*); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1040.) An employee is required to exhaust the administrative remedies of filing an administrative complaint with the DFEH and obtaining a right to sue letter prior to bringing suit under the FEHA (§§ 12960, 12965, subd. (b); *Romano, supra,* 14 Cal.4th at p. 492; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 88.) Filing the administrative complaint within the applicable time limits and obtaining a right to sue letter is a jurisdictional perquisite to maintaining a civil action and failing to do so is a ground for a defense summary judgment. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724 (*Martin*); accord *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 631.)

A. **The statute of limitations bars pre-February 2009 claims.**

As previously noted, the FEHA complaint was filed on February 10, 2010. Appellant's claims are predicated upon conduct which began in 2003. However, any conduct occurring prior to February 9, 2009 is time-barred. (§ 12960, subd. (d); *Romano, supra,* 14 Cal.4th at p. 492.)

Appellant contends that her claims are timely under the continuing violation doctrine. "[T]he continuing violation doctrine comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period."[2] (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812 (*Richards*).) Under the continuing violation doctrine, an employer's conduct is actionable for conduct "that takes place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1056 (*Yanowitz*), citing *Richards, supra*, 26 Cal.4th at p. 812.)

The continuing violations doctrine applies where a plaintiff alleges a retaliatory course of conduct rather than a discrete act of retaliation. (*Yanowitz, supra*, 36 Cal.4th at pp. 1058-1059.) Under this standard, the FEHA "statute of limitations begins to run when an alleged adverse employment action acquires some degree of permanence or finality." (*Id*. at p. 1059.) In determining whether the continuing violation doctrine applies, courts should apply the three factors set forth in *Richards*. (*Yanowitz, supra*, at p. 1059.) Under this test, the continuing violation doctrine applies "if the employer's unlawful actions (1) are sufficiently similar in kind-recognizing . . . that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms [citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence." (*Richards, supra*, 26 Cal.4th at p. 823; accord *Yanowitz, supra*, 36 Cal.4th at p. 1059.) "'[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any

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[2] In the federal context, the continuing violation doctrine does not apply if the acts are discrete and permanent. (*National Railroad Passenger Corporation v. Morgan* (2002) 536 U.S. 101, 113 (*National Railroad*).) *Morgan* considered whether discrete discriminatory or retaliatory acts, including promotion denials, as alleged in an Equal Employment Opportunity Commission charge, were subject to the continuing violation doctrine. *Morgan* concluded that such discrete acts "are not actionable if time-barred, even when they are related to acts alleged in timely filed charges." (*National Railroad, supra*, 536 U.S. 101 at p. 113.)

further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." (*Richards, supra*, at p. 823.)

We cannot conclude the continuous violation doctrine is applicable under the *Richards* factors. First, the actions are not similar in kind. Appellant perceived that she was the target of racial animus beginning in 2003. Ramey, a Caucasian, allegedly discriminated against her by placating an African-American employee. Ramey also allegedly falsely criticized appellant's work performance and would not allow appellant to display Christmas decorations and Russian flags on her desk. Appellant claims that complaints to Ramey's supervisors were ignored. However, by March 2005, appellant was no longer under Ramey's supervision because appellant was transferred to the International Student Office.

In the new department, Yan criticized appellant's work performance. Appellant admitted that Yan made no racial comments to her. Rather, appellant's theory, which was not supported by any evidence, was that Yan harassed her because Yan's supervisor was a friend of Ramey. But, Yan stopped supervising appellant in 2006 when appellant began working in a new department.

While appellant claimed that in the new department she was discriminated against because of her ancestry, there was no apparent connection between Ramey and Yan's treatment of appellant and the new allegations of discrimination. In 2007, when appellant married, Gagliardi commented about appellant's new last name. Douglas said that "all Armenians and Russian students were cheaters." Douglas said she did not like Armenians in particular. She expelled Armenian students from the program without investigating. Douglas instructed appellant to speak in English to Armenian students. Appellant's co-worker, Elliott, stated on different occasions there were "too many damn Armenians' in the department. Thus, Gagliardi, Douglas and Elliott expressed racial animus against Armenians separate and apart from Ramey's agenda. Under the circumstances, it is clear that appellant's claims of racial animus over the six-year period were not related because it involved different departments with different supervisors and co-workers.

Second, the conduct did not occur with reasonable frequency but occurred over a period of at least six years. During that timeframe, appellant was working with different supervisors and co-workers.

Third, if there was discriminatory conduct based on appellant's nationality, the conduct had become permanent by February 10, 2009. According to appellant, she had been in a cycle with her supervisors where her work performance was criticized because of her nationality. She would then complain to her supervisors' superiors that she was being harassed. The employer continued to support appellant's supervisors by denying grievances and instructing appellant to account for her time away from her desk. If appellant was being harassed from department to department because of her nationality, a reasonable employee would have known that this alleged ongoing harassment was permanent because the employer's statements and actions made clear that any efforts to end the harassment would have been futile. (*Richards, supra,* 26 Cal.4th at p. 823.) The

We conclude that the continuous violation doctrine does not apply. As a result, the claims occurring prior to February 9, 2009 are time-barred.

**B. Appellant did not exhaust administrative remedies.**

Respondents contend the seventh, ninth, tenth, and eleventh causes of action are barred because appellant failed to file a claim with the DFEH within one year of the alleged unlawful practices. (§ 12960, subd. (d).) Appellant filed a claim against respondents with the DFEH on February 18, 2010. The claim alleged termination, harassment, retaliation, discrimination and failure to prevent retaliation on the basis of sex, race/color, national origin/ancestry and pregnancy. However, respondents are correct that the DFEH claim does not refer to discrimination for taking CFRA leave (seventh); retaliation for taking CFRA leave (ninth); failure to accommodate disability (tenth); or failure to engage in the interactive process (eleventh). Thus, the trial court correctly determined that these claims were barred for failure to exhaust administrative remedies.

**III. The Race Discrimination Claim (Fourth)**

Courts apply the three-prong burden-shifting test articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, to determine a discrimination claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354-357 (*Guz*).) In such a case, plaintiff has the initial burden to establish a prima facie case of discrimination. (*Guz, supra,* 24 Cal.4th at pp. 354-355.) Appellant's prima facie case required proof: she was a member of a protected class; she was qualified for and performing competently in the position; she suffered an adverse employment action; and some other circumstances which suggests a discriminatory motive. (*Guz, supra, at p.* 355; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321.) The other circumstances requirement may be met with evidence supporting an inference that the employee was discharged for a discriminatory purpose. (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1318.)

Once the prima facie case is established, the burden shifts to an employer to offer a legitimate reason unrelated to the prohibited bias, which if true, would preclude a discrimination finding. (*Guz, supra,* 24 Cal.4th at p. 356.) If the employer sustains its burden, the plaintiff then has "the opportunity to attack the proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Id.* at p. 356.)

The California Supreme Court recently held that in a case tried on the theory that the adverse employment action was based on a mixed motive, an FEHA plaintiff is required to show that discrimination was a "substantial motivating factor" for the decision. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 (*Harris*).) However, "mere discriminatory thoughts or stray remarks are not sufficient to establish liability under the FEHA." (*Harris*, *supra*, 56 Cal.4th at p. 225.)

Appellant provided sufficient evidence to establish a prima facie case. However, respondents then established a legitimate, non-discriminatory reason for placing appellant on the 39-month re-employment list. Appellant had exhausted all her sick leave and extended leave.

Because respondents produced sufficient evidence of a legitimate, nondiscriminatory reason for the adverse employment decision, the burden shifted to appellant to produce evidence of pretext. To avoid summary judgment, appellant was required to produce "substantial responsive evidence" that her employer's action was pretextual. (*Martin, supra*, 29 Cal.App.4th at p. 1718.) "It is not enough for the employee simply to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound [or unfair]." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) This is because the statutes prohibit discriminatory conduct. (*Guz, supra*, 24 Cal.4th at p. 361.) If the proffered reason is nondiscriminatory, the employer's true reason is not required to be wise or correct and can be foolish, trivial or baseless. (*Id*. at p. 358.) There must be "evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.] Accordingly, the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at p. 361.)

The evidence as a whole is insufficient to permit an inference that the actual motivation for placing appellant on the 39-month re-employment list was discriminatory. As previously noted, the discriminatory conduct concerning her nationality occurred before February 2009. Appellant declared that she had not exhausted her leave but produced no evidence that she had not in fact exhausted all her leave by November 26, 2009. In addition, appellant's evidence does not establish that discrimination was a substantial motivating factor in the decision to place her on the 39-month re-employment list. Furthermore, respondents produced evidence that the District's policy was to place employees on the list after sick and extended leave were exhausted. The record is clear that after exhausting all sick leave and extended leave, appellant did not return to work. Appellant also claims she was treated differently than other employees; and because of her prior exemplary performance, respondents should have given her unpaid leave.

Appellant's declaration that as an exemplary employee she was entitled to unpaid leave after exhausting sick and extended leave was insufficient to defeat summary adjudication. Appellant's "subjective personal judgments of her competence alone do not raise a genuine issue of material fact." (*Bradley v. Harcourt, Brace & Co.* (9th Cir.1996) 104 F.3d 267, 270.) "For this purpose, speculation cannot be regarded as substantial responsive evidence." (*Martin, supra*, 29 Cal.App.4th at p. 1718.) In addition, appellant's declaration that other employees received unpaid extended leaves is not sufficient to establish that appellant was entitled to more leave or to raise an inference that the actual motive was discriminatory. The undisputed evidence was that there was a policy of placing employees on the 39-month re-employment list after all sick and extended leave were exhausted. Thus, appellant did not establish a pretext in the adverse employment action taken against her.

The trial court correctly summarily adjudicated the discrimination claim (fourth) against appellant.

**IV. The Harassment Claim (Fifth)**

The FEHA prohibits harassment on the basis of race, national origin or ancestry. (§ 12940, subds. (a), (j)(1).) "In evaluating hostile work environment claims, California looks to both our own state cases and federal authority under title VII of the Civil Rights Act of 1964 [(42 U.S.C. § 2000e-2, (a)(1))]." (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 141-142.) "To be actionable, the harassment must be 'sufficiently severe or pervasive' to alter the conditions of the victim's employment and create an abusive working environment. [Citations.] The 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not violate Title VII, as it would not affect the conditions of employment to a sufficiently significant degree. [Citations.] '[M]ore than an episodic pattern of racial antipathy must be proven to obtain statutory relief. A hostile working environment is shown when the incidents of harassment occur in concert or with a regularity that can reasonably be termed pervasive.' [Citations.]" (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 463 (*Etter*).)

Here, the conduct occurred in three different departments dating as far back as 2003. The conduct in the first department ended in 2005. From 2005 to 2006, appellant was in a different department where she produced no evidence whatsoever of comments or conduct by any supervisor or co-worker of racial animus. In the third department, appellant, produced evidence that prior to 2009 comments were made to her about her last name and Armenians. There was also evidence that she had unfavorable performance reviews. However, appellant produced no evidence that the performance reviews including the Plan of Improvement were not within the scope of the supervisors' normal duties. Furthermore, the stray comments about Armenians over the course of several years by different supervisors and co-workers are not sufficient to establish severe and pervasive conduct. (*Harris, supra*, 56 Cal.4th at p. 225; *Etter, supra*, 67 Cal.App.4th at p. 463.) The trial court properly granted summary adjudication on the harassment claim.

V. **The Retaliation Claim (Sixth)**

Appellant contends triable issues of material fact exist as to whether respondent retaliated against her in violation of the FEHA. Section 12940, subdivision (h) makes it unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices, forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." In order to establish a prima facie case of retaliation, appellant was required to produce evidence that: (1) she engaged in a protected activity; (2) she suffered an adverse employment action such as termination or demotion; and (3) there was a causal link between the protected activity and the adverse action. (*Yanowitz, supra*, 36 Cal.4th at p. 1042; *Guz, supra*, 24 Cal.4th at pp. 354-355.) In order to survive summary adjudication, appellant was required to offer evidence of intentional retaliation. (*Yanowitz, supra*, at p. 1042; *Guz, supra*, at pp. 355-356.) Summary adjudication of this claim was appropriate given appellant's failure to produce any evidence of a connection between a protected activity and an adverse employment action.

Because respondents established a defense to each cause of action, the trial court properly granted summary judgment on the third amended complaint.

## DISPOSITION

The summary judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J. *

FERNS

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.